



December 23, 2011

OFFICIAL COMMENT

LSA Document #08-764 (Antidegradation)
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Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Ave.
Indianapolis, IN 46204-2251
Proposed Antidegradation Rule as Preliminarily Adopted

RE: Indiana Pork Advocacy Coalition/Indiana Farm Bureau Comments on Proposed Antidegradation Rule as Preliminarily Adopted

Indiana Farm Bureau, Inc. and the Indiana Pork Advocacy Coalition appreciate the opportunity to once again express our thoughts and concerns on this proposed rulemaking regarding antidegradation. On behalf of our members, we appreciate the efforts which IDEM has undertaken to address concerns which have been previously raised. While the comments submitted by our organizations to the Water Pollution Control Board on July 27th, 2011 are a more complete account of our concerns, we wish to use this opportunity to reiterate a few major areas where this proposed rule should be improved.

The agency's responses to several of these concerns in the past have indicated that IDEM's interpretation of the proposed rule aligns with our understanding of how antidegradation standards should be implemented according to the Clean Water Act (CWA). However, we are basing this on the agency's interpretations as seen in its responses to our comments, not in the text of the actual rule. The vast majority of our concerns would be eliminated if the rule language was modified to reflect the interpretation of IDEM. The regulated community must be able to rely on the actual text of the rule as that will remain constant while interpretations of an unclear rule could vary over time. Further, the likelihood of ongoing litigation created by unclear rule language is even more concerning than the threat of varying interpretations in the future.

With respect to the applicability section in 327 IAC 2-1.3-1, we remain concerned that some may try to read this language more broadly than it is intended by IDEM. In response to our comments from the second comment period, it was noted that the antidegradation rule only applies to activities regulated by the CWA and the state and federal rules which implement the CWA. Thus, it was stated that this rule does not apply to nonpoint source activities which are exempt from CWA regulation. We agree that this is an appropriate interpretation of the law. However, many activities may be subject to the CWA which are exempt by the terms of the CWA. We believe it is more appropriate that 327 IAC 2-1.3-1 (b) state:

"...deliberate activity subject to an NPDES permit under the Clean Water Act..."

This language more clearly indicates the intent of the agency as explained in the response to comments from the second comment period.

Also in the second response to comments, IDEM has addressed our concern regarding non-discharging facilities with an NPDES permit by saying "[i]f a CAFO general permit does not allow for a discharge, then the CAFO general permit does meet the non-degradation standard." Again, we agree with this interpretation, assuming that this same analysis extends beyond the soon to be defunct CAFO general permit to include individual NPDES

permits for CAFOs as well. Our issue is that this interpretation for non-dischargers seems contradictory with respect to the references to nonpoint sources in the proposed rule. If the absence of a discharge requiring a NPDES permit automatically meets the non-degradation standard, there is no need to mention nonpoint sources in the rule. Not only does the reference appear to run counter to IDEM's interpretation, it is questionable how nonpoint sources could be regulated under this rule based upon the lack of CWA authority.

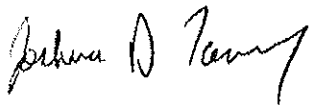
This discrepancy is most notable at 2-1.3-3(a)(1)(B) where establishing "controls as necessary on nonpoint sources..." is discussed. If it is the agency's position that this rule does not apply to nonpoint source activities exempt from CWA regulation, this rule should not reference establishing controls on nonpoint sources. This is not to say that our members do not believe that limiting pollution from nonpoint sources is not an important tool in protecting the environment. However, it does mean that existing authorities must be followed and that efforts outside of controls on point sources should not be a part of this rule. Nonetheless, responses to nonpoint sources of pollution must be considered and coordinated within IDEM with respect to the appropriate programs and regulatory authority. To clarify the agency's intent and to be consistent with the authority which exists under the CWA, the language in 2-1.3-3(a)(1)(B) referencing controls on nonpoint sources should be removed.

We are also concerned about specific mentions of nitrogen and phosphorus as regulated pollutants in 327 IAC 2-1.3-2(44)(A)(ii)(BB) when they would already be covered in the narrative criteria category listed in (44)(A)(ii)(AA). It would seem unnecessary to single out certain pollutants. We recognize and agree that nitrogen and phosphorus could be subject to an antidegradation review. However, focusing attention on nitrogen and phosphorus with rule language when numerous comments have been made alleging that IDEM was essentially ignoring those nutrients does nothing but set unreasonable expectations. The antidegradation review will be limited with respect to nitrogen and phosphorus. The actions which can be required under the antidegradation rule are limited as noted above when addressing nonpoint sources of pollution.

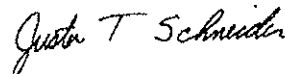
Overall, we are pleased that some changes have been made to this proposed rule. Nonetheless, we remain concerned that the rule is largely unworkable as written. While relatively few agricultural activities are subject to this rule, those that are should have little concern with not being able to show that they will have little or no impact on water quality. That does not change that it will likely be confusing and difficult to make the required showings under this rule.

We thank IDEM and the Water Pollution Control Board for considering these comments. Questions with respect to these comments can be submitted to the undersigned.

Respectfully submitted,



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